

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

THE KROGER CO., et al.,

Plaintiffs,

v.

ACTAVIS HOLDCO U.S., INC., et al.,

Defendants.

MDL 2724
16-MD-2724
HON. CYNTHIA M. Rufe

18-CV-284

**DEFENDANTS' REPLY TO THE KROGER DIRECT-ACTION PLAINTIFFS'
RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

The Kroger DAPs' Response to Defendants' Notice of Supplemental Authority does nothing to change the conclusion that their Motion for Leave to Amend should be denied.

In *In re Nat'l Prescription Opiate Litigation*, --- F.3d ---, 2020 WL 1875174 (6th Cir. Apr. 15, 2020), the Sixth Circuit issued a writ of mandamus instructing the district court to strike an untimely amended complaint submitted after the district court's deadline for amending pleadings. Like the *Opiate* plaintiffs, the Kroger DAPs are attempting to amend a complaint after the district court's deadline for amending pleadings has expired. The Sixth Circuit held that Rule 16 applies in these circumstances and requires plaintiffs to show—without exception—good cause, meaning they acted diligently in pursuing amendment:

[T]he district court's stated basis for finding good cause—namely, that the trial would be most efficient if it included [the amended claims]—is simply no substitute for the showing of diligence required by the Rule. To the contrary, the requirements of the Civil Rules in an MDL case—indeed, the requirements for granting a motion to amend in particular—are the same as those for ordinary litigation on an ordinary docket.

Respectfully, the district court's mistake was to think it had authority to disregard the Rules' requirements . . . in favor of enhancing the efficiency of the MDL as a whole.

2020 WL 1875174, at *3 (internal citation and quotation marks omitted). Thus, even though the Kroger DAPs assert that “discovery in this MDL is still at its nascent stage . . . and deposition discovery has not yet commenced,” Response to Notice of Suppl. Auth. (“Resp.”) at 3, they still must show they acted diligently in pursuing amendment, which they cannot do.

The Kroger DAPs are not relieved of their burden of satisfying Rule 16 based on the purported differences they posit between the circumstances in *Opiate* and this case. For example, the Kroger DAPs assert that “[i]n this case (unlike in *Opiate*), the operative case management order and the Court’s comments at multiple status hearings expressly contemplate amended pleadings.” Resp. at 1. Not true. Just as the case management order in *Opiate* set an amendment deadline, 2020 WL 1875174, at *1, this Court set a December 2018 deadline for amending pleadings in PTO 61. Nothing about PTO 105 or the Court’s comments at status conferences vacate or change the deadline set by PTO 61. Sur-Reply (ECF No. 217) at 3-5. The Kroger DAPs also assert they sought leave to amend while fact discovery is ongoing, unlike the plaintiffs in *Opiate*. Resp. at 2. That distinction is meaningless, unless the Kroger DAPs show they acted diligently in pursuing amendment. They have not. Opp. (ECF No. 206) at 7-11; Sur-Reply at 6-8.

The Kroger DAPs are likewise wrong that the *Opiate* opinion somehow supports their misguided interpretation that PTO 61 is not a “Rule 16 scheduling order,” such that they are relieved of their burden of satisfying the Rule 16 good cause standard. Nowhere does the Sixth Circuit state that the Rule 16 standard applies only if the district court’s order both sets an amendment deadline and includes other items, such as “deadlines to join other parties, complete discovery, and file motions.” Resp. at 2. Indeed, the Sixth Circuit never references those other items at all. Instead, the Sixth Circuit applies the Rule 16 good cause standard because the

district court set an amendment deadline, and then 19 months after the deadline expired, the opioid plaintiffs sought leave to amend. *Opiate*, 2020 WL 1875174, at *2. The same is true here—the Rule 16 good cause standard applies because PTO 61 set an amendment deadline, and then 20 months after the deadline expired, the Kroger DAPs sought leave to amend. Opp. at 7-11; Sur-Reply at 6-8.

Finally, contrasting the *Opiate* opinion with this case does not show that the Kroger DAPs have met their burden of showing good cause. Resp. at 3. Like the plaintiffs in *Opiate*, the Kroger DAPs’ Motion for Leave to Amend did not even attempt to show the diligence that is required to meet the good cause standard. *Opiate*, 2020 WL 1875174, at *3; Opp. at 7. Their belated attempt to do so in their Reply fails as well. Sur-Reply at 6-8. And although it is incorrect to say that “no one is prejudiced by” the Kroger DAPs’ proposed SAC, Resp. 3—indeed, there are 14 motions to dismiss the FAC still pending—“the absence of prejudice . . . does not constitute ‘good cause’ under Rule 16” in any event. *Harbor Laundry Sales, Inc. v. Mayflower Textile Servs. Co.*, No. 09-6259. 2011 WL 6303258, at *3 (D.N.J. Dec. 16, 2011).

Accordingly, the Kroger DAPs, like the plaintiffs in *Opiate*, have not met their burden of showing good cause, and their Motion for Leave to Amend should be denied.

Dated: April 30, 2020

Respectfully submitted,

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